No. 85-413

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FALL TERM 1985

IRA BLACKWOOD

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a conviction pursuant to the Hobbs Act appropriate wherein the evidence reveals that the victim relied on the defendant's personal ability, rather than on the official power of the office held by the defendant?

II. Do the Federal Rules of Evidence allow hearsay evidence to be admitted when its purpose is to show a third party's state of mind?

PARTIES TO THE PROCEEDING

Petitioner: Ira Blackwood

Respondent: United States of America

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions of Lower Court	2
Jurisdiction of the Court	2
Statutes Involved	3
Statement of Facts	4
Argument	5
I. The Opinion of the Court of Appeals for the Seventh Circuit as to What Constitutes "Under Color of Authority" Within the Hobbs Act Is in Conflict With Opinions in the Second, Third and Eighth Circuits	5
II. In Affirming the Ruling of the Lower Court Which Admitted Evidence of Prior Bad Acts, the Seventh Circuit so Far Departed from the Statutory Rules of Evidence and Cases Which Have Interpreted Those Rules as to Invoke the Supervisory Powers of This Court	10
Prayer	13
Appendices	1a

TABLE OF AUTHORITIES

PAGE

Michaelson v. United States, 335 U.S. 469, 475, 476 (1948) 10

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979) 11

United States v. Brown, 540 F.2d 364 (8th Cir. 1976) 7, 8

United States v. Dixon, 596 F.2d 178 (7th Cir. 1979) 12

United States v. Dolliole, 597 F.2d 102 (7th Cir. 1979), *cert. denied*, 442 U.S. 946 (1979) 11

United States v. Drury, 582 F.2d 1181 (8th Cir. 1978) 12

United States v. Fosher, 568 F.2d 207 (1st Cir. 1978) 11

United States v. Grabiec, 563 F.2d 313 (7th Cir. 1977) 10

United States v. Herrell, 588 F.2d 711 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979) 12

United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979), *cert. denied*, 442 U.S. 941 (1979) 10

United States v. Mazzei, 521 F.2d 639 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1014 (1975) 5, 8

United States v. O'Malley, 707 F.2d 1240 (11th Cir. 1983) 10

United States v. Rabbit, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1049 (1978) 8

United States v. Scacchetti, 668 F.2d 643 (2d Cir. 1982), *cert. denied*, 457 U.S. 1132 (1982) 9

United States v. Westbo, 576 F.2d 285 (10th Cir. 1978) 10

PAGE

STATUTES

Title 18 U.S.C. § 1951(b)(2)	3, 5
Federal Rule of Evidence 403	3, 10
Federal Rule of Evidence 404(b)	3, 11
Federal Rule of Evidence 802	3, 10
Federal Rule of Evidence 803(b)	11

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ON WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

The petitioner, IRA BLACKWOOD, prays that a writ of certiorari issue to review judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America v. Ira Blackwood,* No. 84-2852 decided on July 11, 1985.

OPINIONS OF LOWER COURT

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, attached hereto.

JURISDICTION

The Court of Appeals for the Seventh Circuit accepted jurisdiction pursuant to 28 U.S.C. § 1291.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 11, 1985. This petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

HOBBS ACT 18 U.S.C. 1951

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) as used in this section

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

FEDERAL RULE OF EVIDENCE 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULE OF EVIDENCE 404(b)

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FEDERAL RULE OF EVIDENCE 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or Act of Congress.

STATEMENT OF FACTS

Petitioner, IRA BLACKWOOD, a Chicago police officer since 1957, became Secretary of the Traffic Court Unit of the Chicago Police Department in 1974. His duties as Secretary related to the police officers assigned to Traffic Court, such as bookkeeping, medical and attendance records, overtime pay, etc.

Some time thereafter and probably on or about September 4, 1981 (Record at 4), he became a target in a Federal Government probe which came to be known as Operation Greylord. This investigation ultimately led to the naming of IRA BLACKWOOD in an eleven count indictment in December, 1983. He is alleged to have solicited and received various bribes to affect the disposition of cases which occurred in various courtrooms and in various locales throughout the Cook County Criminal Justice System.

Each of the bribes alleged were payments from David Victor Ries, an FBI agent who had assumed the role of a private defense attorney (Record at 8) to the defendant, IRA BLACKWOOD, for the purpose of affecting the disposition of eleven specific cases, as charged in the indictment.

IRA BLACKWOOD was convicted on all counts and an appeal was made to the United States Court of Appeals, Seventh Circuit. The Court of Appeals affirmed the conviction.

ARGUMENT

I. The Opinion of the Court of Appeals for the Seventh Circuit as to What Constitutes "Under Color of Authority" Within the Hobbs Act Is in Conflict With Opinions in the Second, Third and Eighth Circuits.

The Hobbs Act criminalizes the use of "extortion" which impedes commerce and defines "extortion" as "the obtaining of property from another, with his consent induced by the wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951. It is petitioner's contention that the charges against him must fail as a matter of law because the prosecution failed to prove that the petitioner was acting under "color of official right."

It is well recognized that an individual need not have actual authority to deliver his promise so long as the victim of the extortion believed that the defendant had the official authority to deliver on his promise. *United States v. Mazzei,* 521 F.2d 639, 643 (3rd Cir. 1975), *cert. denied,* 423 U.S. 1014 (1975). In the case at Bar, it is clear that the petitioner did not have actual authority to affect the outcome of cases in the traffic courts, *U.S. v. Blackwood* (Slip Op. p4a). Thus, what the prosecution set out to do was to prove that agent Ries reasonably believed that petitioner had the official authority to affect the outcome of cases in the Cook County Court system.

Though petitioner was convicted on all seven counts under the Hobbs Act, it would have been as a matter of law, unreasonable for any person in Ries' position to believe that the petitioner had the official power to affect the outcome of any case within the court system.

First, the only evidence produced at trial went to show that the petitioner had established contacts with Judges who had worked in the same building as did petitioner, and that it was because of these contacts that he had influence over the outcome of criminal cases throughout the criminal courts.

There was no evidence introduced to support a conclusion that Ries could have believed that petitioner had the official power to affect the disposition of any criminal case. Second, given Ries' position as an FBI agent, it is inconceivable that Ries could have believed that petitioner had the official power to affect the disposition of cases. And, even assuming that Ries' special knowledge as an FBI agent should not be looked at, it must be conceded that the reasonableness of the victim's belief should then be based upon the role which Ries was assuming—a lawyer. And, given the special knowledge of a lawyer, it is again inconceivable that Ries, in the role of a lawyer, could have believed that petitioner had the official power to affect the disposition of any case. Finally, it was unreasonable to find that Ries could have believed that petitioner had the official power to affect criminal cases because there was evidence entered that showed that Ries knew that petitioner's influence did not extend to all Judges. (Record at 161-162). Thus, Ries was on notice that petitioner's ability to influence cases did not derive from his official power, for if it had, it would not have mattered before which Judge a case came up. Thus, as a matter of law, it was unreasonable to find that Ries could have believed that petitioner had the *official* power to affect the disposition of any cases within the traffic court.

Yet despite the fact that it was inconceivable that Ries could have believed that the petitioner had the power to affect the disposition of cases, the petitioner was convicted on all seven counts which charged him with violating the Hobbs Act.

In affirming the holding of the District Court, the Seventh Circuit did not hold that the evidence produced was sufficient to uphold a finding that Reis believed that the petitioner had the official power to deliver that which petitioner had promised. Rather, the Seventh Circuit held that there had been sufficient evidence to support a conclusion that Ries reasonably believed that the petitioner's "power to affect judicial determinations was *due*—at least in part—*to his official position* as a patrolman

assigned to the Traffic Court Unit who worked as a liaison between the court and the police department." (emphasis added) (Slip op. at 5). Moreover, it is evident from the Seventh Circuit's opinion that what the Seventh Circuit found to be sufficient was a belief by Ries that petitioner had the power to affect decisions within the entire criminal court of Cook County because of contacts the petitioner had made while working in the traffic court. After reviewing a portion of Ries' testimony which went to show that the petitioner had made contacts with Judges while working in the traffic court and that by way of these contacts petitioner could influence the outcome of cases, the Seventh Circuit stated that:

> "[b]ased on the above evidence, a jury could have found that Agent Ries reasonably believed that appellant had the power, through his official position and the connections and contacts it gave him to the personnel, workings, and records of the Circuit Court to influence the judicial decisions in the cases for which appellant received bribes."

Thus, the Seventh Circuit concluded that it is sufficient that the perceived power of the defendant need only be in some way connected with his official position. (Slip op. at 7). However, such a holding is in conflict with decisions in the Second, Third and Eighth Circuits.

It is evident from opinions in those circuits that they require a showing that the victim believed that the defendant had official power to deliver that which he had promised. In sharp contrast, the Seventh Circuit has found it sufficient that the victim believed that the defendant had power "due to" his official position.

On two occasions the Eighth Circuit has made it evident that it is a victim's perception of the defendant's *official power* that should be focused on. In *United States v. Brown,* 540 F.2d 364 (8th Cir. 1976), the Eighth Circuit held that proof of extortion "under color of official right" required that the victim had a "reasonable belief that the defendant had *official power*

in the capacity through which the extortion was performed." (emphasis added) *Id.* at 372. And again, in *United States v. Rabbit,* 583 F.2d 1014 (8th Cir. 1978), *cert. denied,* 439 U.S. 1049 (1978), the Eighth Circuit made it evident that in order for an individual to be convicted under the Hobbs Act, the victim had to believe that it was within the defendant's official power to deliver that which the defendant had promised. In *Rabbit* the Court found that where the victim knew that the defendant did not have the power to award contracts in his *"official capacity"* (emphasis added), the Government failed to prove that the victim entertained a reasonable belief that the defendant controlled the awarding of contracts. *Id.* at 1028.*

It is evident from *Rabbit* that even though it was believed that the defendant might have had influence over the awarding of contracts, that belief, that a defendant had influence, was not sufficient. Rather, what was required was the belief that it was within the defendant's *official authority* to affect the disposition of that which had been promised.

Thus, the Eighth Circuit in both *Brown* and *Rabbit* has made it evident that it requires a showing that the victim believed that the defendant had the *official power* to deliver on that which the defendant had promised and not merely any power to deliver on that which he had promised.

Similarly the Third Circuit, in *United States v. Mazzei, supra,* made it clear that it is the perception of official power which is crucial to a conviction under the Hobbs Act. In *Mazzei,* the Third Circuit stated that it was sufficient for the Hobbs Act that the victim had a reasonable belief that "the state system so operated that the *power in fact of defendant's office* included the effective authority" to deliver that which the defendant had promised. (emphasis added) 521 F.2d at 643.

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* Similarly if Ries had knowledge either as an FBI agent or as a lawyer that petitioner did not have the official power to affect the disposition of cases in the traffic court, the defendant could not possess apparent power.

Finally, the Second Circuit has held that the essential element of the Hobbs Act was "the use of the office through acts unrelated to the duties of the public official but which could only be undertaken because of his official position." *United States v. Scacchetti,* 668 F.2d 643 (2nd Cir. 1982), *cert. denied,* 457 U.S. 1132 (1982). While this phrasing differs from *Brown, Rabbit* and *Mazzei,* it is evident that it conflicts with the result in the present case, and that given the facts in the present case, petitioner could not have been convicted of violating the Hobbs Act. In the present case, any individual that worked in the traffic court (e.g. janitors, court reporters and lawyers) could have made the same contacts that petitioner had made and thus had the same power. Thus, under *Scacchetti,* the petitioner would not have been convicted because the acts which BLACKWOOD performed were not acts which he could perform because of his official position, but rather because of his employment in a Government building.

In summation, it is clear the decision of the Seventh Circuit is in sharp contrast with decisions in the Second, Third and Eighth Circuits. While those Circuits require a showing that the victim believed that the defendant had official power to deliver that which he had promised, the Seventh Circuit has greatly reduced the requirement for conviction under the Hobbs Act. Under the Seventh Circuit's holding the prosecution only needs to show that the victim believed that the defendant had power to deliver on his promise and that that power was related to the defendant's official position no matter how distant that relation.

In addition to the need for a clear resolution between the conflicting interpretation of the Hobbs Act, this case is important because the holding of the Seventh Circuit vastly increases the scope of the Hobbs Act. Hence, the impact of the Seventh Circuit's opinion has the potential for vastly increasing the breadth of Federal jurisdiction in cases involving "official" corruption.

II. In Affirming the Ruling of the Lower Court Which Admitted Evidence of Prior Bad Acts, the Seventh Circuit so Far Departed From the Statutory Rules of Evidence and Cases Which have Interpreted Those Rules as to Invoke the Supervisory Powers of This Court.

It is well established that as a general rule, evidence of prior illegal activities or wrongdoing is inadmissible. Eg. *United States v. Jackson,* 588 F.2d 1046 (5th Cir. 1979), *cert. denied,* 442 U.S. 941 (1979); *United States v. Westbo,* 576 F.2d 285 (10th Cir. 1978): *United States v. O'Malley,* 707 F.2d 1240 (11th Cir. 1983); *United States v. Grabiec,* 563 F.2d 313 (7th Cir. 1977); see also 28 U.S.C. Rule 403 and 28 U.S.C. Rule 403(b). The reason for this general rule is that evidence of prior illegal activities or wrongdoings is highly prejudicial. See *Michaelson v. United States,* 335 U.S. 469, 475, 476 (1948).

Therefore, evidence of prior bad acts can only be admitted where the probative value of such evidence substantially outweighs its prejudice to the defendant. 28 U.S.C. Rule 403.

In the present case, both the trial court and the Court of Appeals (Seventh Circuit) have ignored the above stated principles. The trial court admitted evidence of prior bad acts (Record at 537) that was highly prejudicial, even though it had little if any, probative value. First, the evidence that was admitted was hearsay. It contradicts basic rules of evidence to find that the evidence in question had probative value since the evidence should have been excluded pursuant to Federal Rule of Evidence 802, 28 U.S.C. Rule 802, which prohibits the admission of hearsay. Nor would it be possible to find an exception to the hearsay rule that would allow this evidence to be admitted.

Ostensibly, the trial court allowed the evidence in to show "people's state of mind." (Record at 537). However, since only Ries' state of mind was relevant to the action, Lockwood's

testimony had to have been admitted to show Ries' state of mind (had it been offered to show anyone else's state of mind it should have been excluded as irrelevant). While there is a state of mind exception under Rule 803(3), that exception is limited to admitting hearsay to show the state of mind of the declarant. 28 U.S.C. Rule 803(b). There is no exception which allows hearsay to be admitted to show that state of mind of a third person that is neither the witness, nor the declarant.

Furthermore, even if such evidence had not been hearsay it should not have been admitted because its probative value was deminimus. It was deminimus because there was other evidence that was sufficient to show that Ries believed that the petitioner had some sort of power to affect the disposition of cases within the criminal courts, as the Court of Appeals noted in its opinion; Agent Ries' belief was explored in detail in 169 pages of direct testimony. (Slip op. at p. 5). Thus, the need for the prejudicial evidence admitted was minimal indeed.

By allowing the evidence in, both the District Court and the Court of Appeals have ignored the principles behind Rule 404(b). The Advisory note to Rule 404(b) states that "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof . . ." Advisory note to 28 U.S.C. Rule 404(b). Similarly, cases in other Circuits and the Seventh Circuit itself, have indicated the usefulness of assessing the Government's need for the evidence. *United States v. Dolliole,* 597 F.2d 102 (7th Cir. 1979), *cert. denied,* 442 U.S. 946 (1979); *United States v. Fosher,* 568 F2.d 207, 213 (1st Cir. 1978); *United States v. Beechum,* 582 F.2d 898, 914 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979).

Finally, the evidence as to prior bad acts was anomalous to reality. The evidence admitted directly inferred that criminal charges had been brought against the petitioner when, in fact, no such charges ever existed. Thus the evidence was grievously

unjust in that it allowed the jury to hear of criminal charges, which were in fact never brought, and it reduced the probative value to naught, while simultaneously increasing its prejudicial effect. The lack of probative value of the evidence in question is evidenced by the fact that the admittance of prior bad acts into evidence has as a rule been conditioned on such evidence being clear and convincing. *United States v. Dixon,* 596 F.2d 178 (7th Cir 1979); *United States v. Drury,* 582 F.2d 1181, 1184, N.6 (8th Cir. 1978); *United States v. Herrell,* 588 F.2d 711 (9th Cir. 1978), *cert. denied,* 440 U.S. 964 (1979). Because the evidence was in fact erroneous, it was neither clear nor convincing. Thus, the Seventh Circuit has put itself in conflict with other Circuits and has so far departed from the statutory rules of evidence and cases which have interpreted those rules, as to invoke the supervisory powers of this Court.

PRAYER

Petitioner prays that this Honorable Court grant his petition for issuance of a writ of certiorari.

Respectfully submitted,

IRA BLACKWOOD

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2852

UNITED STATES OF AMERICA,

Appellee,

v.

IRA BLACKWOOD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 83 CR 977—James B. Moran, *District Judge.*

ARGUED APRIL 24, 1985—DECIDED JULY 11, 1985

Before ESCHBACH and POSNER, *Circuit Judges,* and TIMBERS, *Senior Circuit Judge.**

TIMBERS, *Circuit Judge.* On December 14, 1983, Ira Blackwood (appellant) was indicted by a federal grand jury and charged with one count of racketeering (Count One) in violation of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982), and ten counts of extortion (Counts Two through Eleven) in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982). On July 2, 1984, the United States District Court for the Northern District of Illinois, James B. Moran, *District Judge,* denied appellant's motion to dismiss the indictment. On August 10, 1984, the court entered judgment on a jury verdict finding appellant guilty on all

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* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

eleven counts. Appellant was sentenced on October 18, 1984 to two concurrent terms of imprisonment of seven years each on Counts One and Two, to be followed by nine concurrent terms of probation of five years each on Counts Three through Eleven. The court ordered a stay of execution pending appeal.

I.

Appellant became a police officer with the Chicago Police Department in 1957. He became secretary of the Department's Traffic Court Unit in 1974. His office was in the Cook County Traffic Court building until February 1983 when he became a court sergeant in one of the branch courts of the Cook County Circuit Court.

Appellant's indictment stemmed from the Federal Bureau of Investigation undercover investigation known as Operation Greylord which concerned alleged corruption in the Cook County Circuit Court. Appellant was indicted for soliciting and receiving bribes between December 1981 and May 1983 from FBI Agent David Ries to influence the disposition of cases pending in various branch courts of the Cook County Circuit Court in violation of 18 U.S.C. §§ 1951 and 1962(c).

In September 1981, appellant was introduced to Agent Ries by former Judge Brocton Lockwood who had contacted the United States Department of Justice about criminal violations he believed were occurring in the Traffic Court building. Judge Lockwood agreed to cooperate with the investigation. He posed as a corruptible judge in the Cook County Circuit Court. Agent Ries posed as a private defense attorney new to the City of Chicago who was looking for a contact to help him in his practice of law in the Cook County court system which we have described above. Agent Ries paid appellant a total of $4400 to influence judicial decisions in the ten circuit court

misdemeanor cases[1] which formed the basis of the indictment.

On appeal, appellant claims that his indictment and conviction for racketeering and extortion cannot stand as a matter of law; that the court committed reversible error in its evidentiary rulings; and that the government violated his Fifth Amendment privilege against self-incrimination by commenting on his failure to testify. We shall consider each of these claims seriatim.

II.

(A) HOBBS ACT

The Hobbs Act, 18 U.S.C. § 1951, proscribes extortion which affects interstate commerce. The Act defines extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). A public official's use of his office to obtain money not due him or his office is "the crux of the statutory requirement of 'under color of official right' ". *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

> "It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even . . . to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *Id.*

In *United States* v. *Rindone*, 631 F.2d 491 (7th Cir. 1980), we held that

> "*De jure* ability to perform the promised act need not be present; sufficient is 'a reasonable belief that the

[1] Nine of the cases were contrived by the FBI; only one was based on events which actually took place.

state system so operated that the power in fact of the defendant's office included the effective authority' to fulfill the promise." *Id.* at 495, *quoting Untied States* v. *Mazzei*, 521 F.2d 639, 643 (3rd Cir.), *cert. denied*, 423 U.S. 1014 (1975).

Appellant contends that the court erred in denying his motion to dismiss Counts Two through Eleven which charged him with violating the Hobbs Act. He contends that those counts did not allege extortion "under color of official right", since as a matter of law it is unreasonable for the victim of an extortion to believe that a police officer assigned to the Traffic Court Unit of the Chicago Police Department, by virtue of his official position, has the power to affect the disposition of cases being tried in the Circuit Court of Cook County. We cannot say that as a matter of law appellant's victim could not reasonably have believed that appellant's official position enabled him to keep his promise to influence judicial decisions by passing bribes on to judges in the Traffic Court and to judges Agent Ries believed had previously worked in the Traffic Court. *United States* v. *Kaye*, 586 F. Supp. 1395, 1405 (N.D. Ill. 1984). We hold that the court correctly denied appellant's motion to dismiss the Hobbs Act counts.

Appellant also contends that the evidence adduced at trial was insufficient to sustain the conviction on Counts Two through Eleven, since the evidence failed to establish that Agent Ries, the victim of the extortion, reasonably believed that appellant, by virtue of his official position, could influence the judicial disposition of cases heard in the Traffic Court and other local courts. We must view the evidence in the light most favorable to the government, *United States* v. *Crowley*, 504 F.2d 992, 995 (7th Cir. 1974), and affirm the conviction if there was some competent and substantial evidence before the jury which fairly tended to sustain the verdict. *Abrams* v. *United States*, 250 U.S. 616, 619 (1919).

Clearly, appellant's official position did not encompass the power to render judicial decisions. There was, however, competent and substantial evidence before the jury

No. 84-2852

from which it could have concluded that Agent Ries reasonably believed that appellant's power to affect judicial determinations was due—at least in part—to his official position as a patrolman assigned to the Traffic Court Unit who worked as a liaison between the court and the police department.

In his opening statement at trial, appellant's counsel made clear that appellant's defense to the Hobbs Act charges was that "no person with any semblance of reasonableness could have believed that [appellant] possessed any type of clout, a patrolman on the Chicago police force." The reasonableness of Agent Ries' belief was explored in detail in 169 pages of direct testimony by Agent Ries, followed by 302 pages of cross-examination. Ries testified regarding his belief about the power of appellant's position, his conversations with appellant, his observations of appellant, and appellant's independent knowledge of the court proceedings in question. Approximately 400 pages of transcript from taped conversations with appellant were reproduced for the jury.

Agent Ries testified that he saw appellant at various locations in the Traffic Court building—appellant's office, the hallways of the first three floors, various courtrooms, the Corporation Counsel's office, and the Cook County Circuit Court Clerk's office. Agent Ries observed appellant talking to policemen, various members of the public, traffic court defendants, court clerks, court administrators, bailiffs, private defense attorneys, attorneys on the staff of the Corporation Counsel, assistant state's attorneys for Cook County, and Traffic Court judges.

Agent Ries further testified that each time he paid appellant money in regard to a particular case, his state of mind was

> "that Officer Blackwood, by virtue of his position in the traffic court section and as a court sergeant, and by virtue of the knowledge and experience gained from that position, and by virtue of the people he knew, the judges, other court personnel that he knew,

that he had the ability to influence the disposition of cases heard in Cook County Circuit Court.

. . .

My state of mind during this time period was based on several things, one of which was my general conversations with Ira, his demeanor, the tone of voice, his inflections, how he handled himself, how he carried himself.

Likewise, it was based on the people with whom I had seen him speaking, the places that I had seen him, the people about whom he spoke and the way he spoke about them.

It was also based on the general structure of our dealings in these cases where I would give him the information about the cases, and he would meticulously copy it down, and that later on he would get back to me telling me whether he could do anything on the case and what it was going to cost me.

Likewise, that if there was a specific judge that was going to be hearing a case that he could not influence, he would, likewise, tell me that.

. . .

It was also based on his ability to know things about these cases that I did not tell him, so that it indicated to me that he had an independent source of knowledge about these things.

On the 11 cases on which we had prior arrangements on, 10 of those cases were resolved in a favorable manner.

The two judges that I talked to in regards to these cases, both of them acknowledged some prior contact about these cases.

In the case of [Talmas] Benham, Officer Blackwood was able to produce tangible results for me without the defendant ever showing up in court,

without me showing up in court. I received a bond slip through the Circuit Court of Cook County.

Likewise, when the government did have [a] wiretap on his phones, Officer Blackwood did know about that. He told me about that several times."

On cross-examination, Agent Ries testified that he believed that appellant had knowledge of the type of judge that would serve in the particular courtrooms and that appellant was able to influence a decision with some of the judges who often sat there.

Agent Ries testified that appellant told him on April 12, 1982 that he took "care of parking tickets for several judges, and that he knew several judges from the time that he had been in traffic court as they passed through there." Appellant stated on February 17, 1983 in a tape recorded conversation with Agent Ries that, if a judge had a problem, he would see appellant, that the judges came to him "for tickets, or for any car fixin', or anything they needed", that "that's how I got in with all the judges.... [G]o see Ira. That was the name of the game.... So I got in with every judge...."

Based on the above evidence, a jury could have found that Agent Ries reasonably believed that appellant had the power, through his official position and the connections and contacts it gave him to the personnel, workings, and records of the Circuit Court, to influence the judicial decisions in the cases for which appellant received bribes. We hold that there is no basis for disturbing the jury's resolution of this issue.

Appellant's final contention regarding the Hobbs Act counts is that the court erred in failing to instruct the jury that Agent Ries' belief that appellant, by virtue of his official position, had the power to influence judicial decisions must have been reasonable "given Reis' [sic] position, his knowledge and experience". Since appellant never requested the court to give such an instruction and failed to object to the instructions given on the ground

now raised on appeal, he may not assign error in this respect except on the ground of plain error. Fed. R. Crim. P. 30, 52(b).

The court gave the following instructions to the jury concerning the element of "under color of official right":

> "Extortion under color of official right means the obtaining of money or property by a public employee through the wrongful use of his position where the money or property obtained was not lawfully due and owing to him or to the position which he held. It includes the misuse of one's position of employment in order to induce payments. The government must prove beyond a reasonable doubt that it was reasonable for the persons described in Counts II through XI to believe that the defendant had power to obtain favorable results in the FBI-created cases.
>
> I further instruct you that in considering whether extortion under color of official right was committed, it does not matter who induced the payments. If the public employee knows that the motivation of the alleged victim named in the indictment focused on the employee's public position and that the money or property that was allegedly paid by the victim was not lawfully due and owing to the employee or to the office which he held, that is sufficient to satisfy the requirements of the law of extortion under color of official right so long as I have said the government also proved that it was reasonable for the persons described in counts II through XI to believe that the defendant had the power to obtain favorable results in the FBI-created cases.
>
> . . .
>
> Extortion under color of specific [sic] right does not require proof of specific acts by an employee demonstrating force, threat or use of fear so long as the alleged victim consented because of the office of [sic] position held by the employee to whom the alleged victim paid the money or property.

No. 84-2852

...

> The public employee need not control the result promised so long as the extorted party possesses a reasonable belief in the employee's power to obtain the results."

The court also gave an interim instruction to the jury during the cross-examination of Agent Ries that the government must

> "prove beyond a reasonable doubt that Agent Ries in paying money reasonably believed that the defendant, because of his public position, had the power to affect the disposition of cases."

Since the instructions given adequately apprised the jury that the government must prove that it was reasonable for Agent Ries to believe that appellant had the power to influence judicial decisions, and that Agent Ries focused on appellant's official position in paying the bribes, we hold that there was no plain error.

(B) RICO

RICO, 18 U.S.C. § 1962(c), makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Appellant contends that the court erred in denying his motion to dismiss Count One which charged him with racketeering in violation of RICO, since the indictment failed to charge that he was associated with an enterprise that was organized for the purpose of carrying on racketeering activity. The enterprise specified in the indictment was the Cook County Circuit Court. Appellant's contention is without merit. RICO encompasses both legitimate and illegitimate enterprises. *United States* v. *Turkette*, 452 U.S. 576, 578-83 (1981).

Appellant also contends that the evidence adduced at trial was insufficient to sustain the conviction on Count

One. He concedes that the government proved that he was associated with a legitimate enterprise and that he committed racketeering activity while so associated. He contends that it failed to prove that he conducted his racketeering activity through the Cook County Circuit Court. At issue is whether there was sufficient evidence of a connection between appellant's racketeering activity and the affairs of the Circuit Court to support a jury finding that appellant directly or indirectly conducted or participated in the conduct of the affairs of the Circuit Court through a pattern of racketeering activity. *See United States* v. *Nerone*, 563 F.2d 836, 852 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). To establish the requisite nexus, the government must show that "(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise." *United States* v. *Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983) (footnote omitted), *cert. denied*, ____ U.S. ____, 104 S.Ct. 996 (1984). Effect on the lawful enterprise is established by proof that "the racketeering acts affected the enterprise in some fashion." *Id.* at 1333 n.24.

We hold that here there was sufficient evidence from which a jury could find that appellant sought to influence the disposition, or affect the handling, of criminal cases through solicitation of bribes, falsification of Circuit Court records, use of Circuit Court offices and equipment, and contact with Circuit Court judges.

III.

Appellant contends that certain of the court's evidentiary rulings constituted reversible error. He claims that the court erred in admitting testimony regarding his prior bad acts and testimony to prove Agent Ries' state of mind regarding appellant's power, by virtue of his official position, to influence judicial decisions.

No. 84-2852

Judge Lockwood was permitted to testify that appellant told him

> "that he had a lot of clout within the system, that he had been in trouble nine years before, that some big people were ready to jump off bridges at that time, that he kept his mouth shut, and that as a result everybody trusted him. He took the heat at that time, and charges were eventually dismissed against him."

Following this testimony, the court gave a limiting instruction that the testimony was to be considered solely in connection with the "state of mind of people respecting what the defendant could or couldn't do." Appellant asked the court to declare a mistrial on the ground that the testimony "clearly says to the jury [appellant] was guilty in the past". After the court denied appellant's request, appellant rejected the court's offer to further instruct the jury on its use of the testimony.

While "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith", it "may, however, be admissible for other purposes . . . ." Fed. R. Evid. 404(b). Here, the evidence was admitted to prove the reasonableness of Agent Ries' belief that appellant was extorting him under color of official right. Much of what Agent Ries reasonably could believe about appellant's power, by virtue of his official position, was influenced by his knowledge of the conversations Judge Lockwood had with appellant. Evidence of a victim's state of mind is an essential element of the government's case in a Hobbs Act prosecution for extortion under color of official right. *United States* v. *Craig*, 573 F.2d 513, 520 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978). The evidence, therefore, is admissible to prove that element so long as the danger of unfair prejudice does not outweigh its probative value. Fed. R. Evid. 403. The court considered the prejudice to appellant from the references to being "in trouble" and "charges" being "eventually dismissed against him", but noted that the statement "was couched in terms of kee-

ping his mouth shut, which is more a matter of knowing and not telling". The court concluded that, in light of appellant's defense that the victim's belief was unreasonable, the likelihood of prejudice was lessened. The court admitted the evidence for its probative value in establishing the reasonableness of the victim's belief. The admissibility of such evidence is within the sound discretion of the court. We hold that the court did not abuse its discretion in admitting the evidence and refusing to declare a mistrial.

Appellant also contends that certain evidence was inadmissible hearsay—Agent Ries' statements regarding his state of mind during the investigation, Ries' testimony regarding appellant's alleged statements to him, and a taped conversation between two persons not called as witnesses which Ries testified affected his state of mind regarding appellant's ability to influence a particular judge. Since the evidence was offered to show that Ries, as the victim of appellant's extortion, reasonably believed that appellant had the power by virtue of his official position to influence the judicial disposition of cases, and was not offered "to prove the truth of the matter asserted", it was not inadmissible as hearsay. Fed. R. Evid. 801(c).

We hold that the court did not err in its evidentiary rulings.

IV.

Appellant's final contention is that the following comment made by the government in its closing argument violated his Fifth Amendment privilege not to "be compelled in any criminal case to be a witness against himself":

> "Let me just say, we have his words, we have his deeds, we have him holding himself out all of these remarkable coincidences, Dave Ries is supposed to believe I am so gullible that all this stuff would have

> happened anyway, it doesn't make any difference in the size or the age of these particular cases. Let's get down to what this case is all about: money. *What has that defendant told you about money*?" (emphasis added).

Appellant's counsel objected that the last sentence violated his client's constitutional right to remain silent. The government attorney stated that he was about to quote what appellant had said in regard to money in the tape recorded conversations that had been admitted in evidence. The court ruled that the government could comment on what appellant had said on the tapes.

While we are wary of any statement which refers to a defendant's failure to testify, we do not believe that any juror could have understood this comment as referring to anything other than appellant's taped statements. The comment was made approximately an hour and twenty minutes into the government's closing argument during which time the government attorney had quoted, paraphrased, and referred approximately one hundred times to what appellant had said in the tapes and the transcripts of his conversations. Following the comment in question, the government attorney proceeded to quote and paraphrase eleven specific instances in the tapes and the transcripts where appellant stated that he was motivated by money.

Considering the comment in context, we hold that it did not violate appellant's constitutional right. Even assuming that it did, we hold that it was harmless beyond a reasonable doubt. *United States* v. *Hasting*, 461 U.S. 499, 510-11 (1983).

V.

To summarize: We hold that the district court correctly denied appellant's motion to dismiss the indictment and correctly entered judgment on the jury verdict of guilty on all counts. We further hold that appellant has

failed to establish any reversible error in the court's evidentiary rulings or in the court's ruling with respect to the government's closing argument.

Appellant was convicted after a fair trial on the basis of overwhelming evidence of serious crimes committed over a period of a year and a half. We order that the mandate issue forthwith.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—7-11-85—450

[4] Ries—direct

Q. Mr. Ries, how are you employed?

A. I am a special agent with the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Since July of 1976.

Q. Do you know a man by the name of Ira Blackwood?

A. Yes, I do.

Q. Do you see him in the courtroom today?

A. Yes, I do.

MR. RODDY: We will stipulate for the record that he is seated at the table here.

MR. NEWMAN: So stipulated?

THE COURT: It is so stipulated.

BY MR. NEWMAN:

Q. When did you first meet Mr. Blackwood?

A. September 4th, 1981.

Q. And when did you arrive in Chicago?

A. In March of 1980.

Q. When you met Mr. Blackwood on September 4th, 1981, how was he employed, if you know?

A. He was a Chicago police officer.

Q. Where was he employed?

A. At Cook County traffic center, 321 North La Salle Street in Chicago.

Q. What position did he hold, if you know?

[8] Q. Did you hold any licenses at that time?

A. Yes, I did.

Q. What type of license did you hold?

A. I held a license to practice law in the State of Illinois.

Q. During this same period of time, 1981 to May of '83, did you assume any role?

A. Yes, I did.

Q. Would you tell the ladies and gentlemen of the jury what your role was.

A. I assumed the role of a private defense attorney in private practice within the City of Chicago.

Q. Did you use your real name?

A. Yes, I did.

Q. And did you also use a code name?

A. Yes, I did.

Q. Did you also alter your name a little bit to adopt also your code name?

A. Yes.

Q. Were you part of an undercover investigation?

A. Yes, I was.

Q. What was the name of that investigation?

A. The investigation was commonly known as the Greylord investigation.

Q. What type of practice were you in?

A. I was allegedly involved in a criminal defense and traffic

[161] gained from that position, and by virtue of the people he knew, the judges, other court personnel that he knew, that he

had the ability to influence the disposition of cases heard in Cook County Circuit Court.

My state of mind at that time I believe was based on several things.

MR. RODDY: I object to this. I don't know if there is a question pending, or are we to going to get a narrative here.

MR. NEWMAN: I asked him what his state of mind was based on.

THE COURT: There is a question pending.

BY THE WITNESS:

A. My state of mind during this time period was based on several things, one of which was my general conversations with Ira, his demeanor, the tone of voice, his inflections, how he handled himself, how he carried himself.

Likewise, it was based on the people with whom I had seen him speaking, the places that I had seen him, the people about whom he spoke and the way he spoke about them.

It was also based on the general structure of our dealings in these cases where I would give him the information about the cases, and he would meticulously copy it down, and that later on he would get back to me telling me whether he could do anything on the case and what it was going to cost me.

Likewise, that if there was a specific judge that was [162] going to be hearing a case that he could not influence, he would, likewise, tell me that.

It was based on the fact that he was able to know things—

MR. RODDY: I object, again, to a speech rather than answer as to the state of mind. It's becoming a speech here.

THE COURT: I think he can continue, although it is sort of dragging out.

Go ahead.

BY THE WITNESS:

A. It was also based on his ability to know things about these cases that I did not tell him, so that it indicated to me that he had an independent source of knowledge about these things.

On the 11 cases on which we had prior arrangements on, 10 of those cases were resolved in a favorable manner.

The two judges that I talked to in regards to these cases, both of them acknowledged some prior contact about these cases.

In the case of Thomas Benham, Officer Blackwood was able to produce tangible results for me without the defendant ever showing up in court, without me showing up in court. I received a bond slip through the Circuit Court of Cook County.

Likewise, when the government did have wiretap on his phones, Officer Blackwood did know about that. He told me about that several times.

I think that about wraps it up.

[537] Lockwood—direct

him.

THE COURT: It is relevant. I think it can come in. I am perfectly prepared to give an instruction to the effect that the statements relating to matters which by testimony the defendant was not involved in and that they are matters that have nothing to do with the substance of the charges here.

MR. RODDY: Okay.

(End of discussion at side bar.)

BY MR. PODLISKA:

Q. Mr. Lockwood, you may continue. What did Officer Blackwood tell you?

A. He told me that, in explaining that he had a lot of clout within the system, that he had been in trouble nine years before, that some big people were ready to jump off bridges at that time, that he kept his mouth shut, and that as a result everybody trusted him. He took the heat at that time, and charges were eventually dismissed against him.

THE COURT: Ladies and gentlemen, with reference to that. As is evident, the testimony is not with respect to anything that this defendant did wrong at a prior time, and in any event that has nothing to do with the substance of the charges that are before you now, as the testimony is introduced solely for matters of state of mind of people respecting what the defendant could or couldn't do.

MR. RODDY: Judge, could I be heard again at the sidebar?